(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Philip L. Firetag.....PETITONER

VS.

THE COMMISONER OF THE INTERNAL REVENUE SERVICE.....RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

PETION FOR WRIT OF CERTIORARI

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62 pp

Questions Presented for Review

Question: Does section 461 (f) of the Internal Revenue Code give rise to a tax deduction under South Carolina statue, in the circumstances of a professional bail bondsman?

Question: Did the Internal Revenue Service act with prejudice in this matter, by instituting Section 481?

Question: Does the fact that Internal Revenue Service policy was suspended by this special class audit raise an equal protection issue?

Question: In light of recent Congressional mandates, making the Internal Revenue Service more taxpayer friendly, should the Commissioner re-examine the handling of this case?

LIST OF PARTIES

All parties appear in the caption of the case on the front cover page.

TABLE OF CONTENTS

OPINIONS BELOW	vi
JURISDICTION	vii
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	viii - ix
STATEMENT OF THE CASE	1
REASON FOR GRANTING THE WRIT	6
CONCLUSION	21

INDEX TO APPENDICES

APPENDIX A	The Fourth Circuit Court of Appeals opinion
APPENDIX B	United States Tax Court Decision

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Rameau A. Johnson, et ux. et al v. Commissioner 108 T.C. 275-280 7

Estate of Clarence W. Ennis, 23 T.C. 799 (NA) 802 7

Re: Steen v. U.S., 509 F. 2d 139835 AFTR 2d 75-623 8

South Pacific Transportation Co., 75 T.C. 497 (1980) 684-85 and 742 8

Stendig v. Commissioner 16 and 24 8,15,17,18

McGill V. Mcgill, 113 p. 2d 826 and 827 14

Rankin v. Commissioner, 14 10,18,19

Sebring v. Commissioner,19-20 and 227 10,11,18

Miehle v. Commissioner, 20-21 15

Matter of Reisenberg, 28 S.Vt. 219, 223. 208 U.S. 90 16

Commissioner v. Indianapolis Power & Light Co., 793 U.S. 203(1990), 65 AFTR 2d 90-394 24 16,17

STATUTES AND RULES

28 U.S.C. S1254(1) vii

SOUTH CAROLINA CODE ANN. SEC. 38-53-330 (Law. Co-op. 1989) 2

SOUTH CAROLINA CODE ANN. SEC. 38-53-270(Law. Co-op. 1989) 2,13,14

SOUTH CAROLINA CODE ANN. SEC. 38-53-280 (Law. Co-op. 1989) 3,13,14

SOUTH CAROLINA CODE ANN. SEC. 38-53-290 (Law. Co-op. 1989) 14

Chapter 53 of Title 38 of the South Carolina Code of Laws 2,7,11

Reg. Section 1.461(c)(1) 16

Reg. Section 1.461(c)(2) 16

Reg. Section 481 18,19,20

Reg. Section 461 5,6,7,8

Reg. Section 1.461(f) 5,6,7,8

Reg. Section 1.446-1(a)(3) 7

OTHER

89 C.J.S. Trusts Sec. 14, Footnote 69, Other Definitions (3) 14

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at appendix A to the petition and is unpublished.

The opinion of the United States Tax Court appears at appendix B to the petition.

JURISDICTION

The date on which the United States Court of Appeals decided my case was October 12, 2000.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 17, 2001, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rameau A. Johnson, et ux. et al v.

Commissioner 108 T.C. 275-280

Estate of Clarence W. Ennis, 23 T.C. 799 (NA) 802

Re: Steen v. U.S., 509 F. 2d 139835 AFTR 2d 75-623

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684-85 and 742

Stendig v. Commissioner 16 and 24

McGill V. Mcgill, 113 p. 2d 826 and 827

Rankin v. Commissioner, 14

Sebring v. Commissioner 19-20 and 227

Miehle v. Commissioner 20-21

Matter of Reisenberg, 28 S.Vt. 219, 223. 208 U.S. 90

Commissioner v. Indianapolis Power & Light Co., 793 U.S. 203(1990), 65 AFTR 2d 90-394 24

28 U.S.C. S1254(1) SOUTH CAROLINA CODE ANN. SEC. 38-53-330 (Law. Co-op. 1989)

SOUTH CAROLINA CODE ANN. SEC. 38-53-270(Law. Co-op. 1989)

SOUTH CAROLINA CODE ANN. SEC. 38-53-280 (Law. Co-op. 1989)

SOUTH CAROLINA CODE ANN. SEC. 38-53-290 (Law. Co-op. 1989)

Chapter 53 of Title 38 of the South Carolina Code of Laws

Reg. Section 1.461(c)(1)

Reg. Section 1.461(c)(2)

Reg. Section 481

Reg. Section 461

Reg. Section 1.461(f)

89 Reg. Section 1.446-1(a)(3)

C.J.S. Trusts Sec. 14, Footnote 69, Other Definitions (3)

STATEMENT OF THE CASE

This case rests on the question of timing. I have maintained the income in question is not earned until the undertakings have ended and the bondholder, i.e. the State, is satisfied.

The Internal Revenue Service, during a special class audit, (involving certain "targeted business groups"; bail bonding, of which I am a member, was one of these) found that my method of accounting did not accurately reflect my income, i.e., that monies beyond my control and held by the State were taxable as income.

I have been a licensed professional bail bondsman, since 1986, and before my trial in Tax Court, I had been in the bonding business for more that 20 years. I conducted my business as a sole proprietorship. The proprietorship income was reported using the accrual method of accounting. I wrote bonds for criminal defendants to ensure their future appearance in court. The bonds varied in amount and were set by the court. The defendants, or someone on their behalf (collectively, my clients), would pay me a fee (usually equal to 10 percent of the amount of the bond, sometimes less), and in exchange I would assume liability to the State of South Carolina or the Federal Court, guaranteeing the defendant's appearance at court proceedings. Under my bonding agreement, the fee was due from a client when the agreement was signed. In

addition, the bonding agreement provided that the fee was earned upon execution of the agreement. If I was unable to fulfill my guaranty, i.e., if the defendant failed to make the court appearance, I was liable to the court for the full amount of the bond.

As a professional bail bondsman, I was required to comply with chapter 53 of Title 38 of the Code of Laws of South Carolina. Pursuant to these provisions, I was required to maintain, with the clerk of court of the relevant South Carolina jurisdiction, passbook savings accounts or certificates of deposit in an amount equal to 25 percent of all outstanding bonds on which I was liable. In addition, no single bond written could be in an amount greater that 50 percent of the amount maintained with the clerk of court. See S.C. Code Ann. sec. 38-53-330 (Law. Co-op. 1989) The amount required to be maintained was recomputed as of the first day of each month, on the basis of the bonds outstanding on that date, and I had until the 16th of the month to make any additions required to ensure that the amounts maintained with the clerk were equal to at least 25 percent of that face amount of bonds outstanding on the first of the month. See S.C. Code Ann. sec. 38-53-270 (Law. Co-op. 1989). The certificates of deposit were held in trust in the name of the clerk of court for the "sole protection and benefit of the holder of bail bonds", i.e., the State of South Carolina, and functioned as security for any potential liability on outstanding bonds. S. C.

Code Ann. sec. 38-53-280 (Law. Co-op. 1989). In the event of a forfeiture, i.e., the failure of a defendant to appear for trial, making me liable for the bond amount, I had the option of meeting my liability using funds maintained with the clerk of court or from some other source.

Under South Carolina law, I was entitled to a return of excess whenever the amounts maintained with the clerk exceeded 25 percent of my outstanding bonds and was entitled to the return of all amounts when my bond obligations were completely satisfied.

Pursuant to the foregoing provisions of South Carolina law, I maintained various certificates of deposit with the Clerk of Court for Charleston County, South Carolina, prior to and during the years in issue, in connection with my activities as a professional bail bondsman. I shall hereinafter refer to these certificates of deposit held by the Charleston County Clerk of Court as the Charleston County Court account. At no point during the years in issue, or in any year prior thereto, were funds from the Charleston County Courts account used to satisfy a forfeiture, because to handle a forfeiture in this way would result in the suspension of my license to operate my business.

I received any interest earned on the funds in the Charleston County Court account, and taxes were paid on these proceeds.

I also maintained two other accounts, the first a "clients' escrow" account, where all fees and monies held as collateral were deposited. All monies received went into this account. From this account, all required increases, per South Carolina Law, to the Charleston County Courts account were made; all required United States District Court bonds were written; all forfeitures were paid, and from this account a percentage, about 35 percent annually, went into a regular business account from which monies was dispersed to pay expenses, and my "salary".

As for the "clients' escrow" account, it was not required by any law or contract. It was established at the suggestion of my father, a licensed and respected public accountant with over 40 years of experience, who kept my books and prepared my tax returns, and determined that this method of accounting conformed to existing tax law.

I reported gross receipts from my bonding business of $80,456 in 1992 and $100,467 in 1993. However, for taxable years prior to and including 1992 and 1993, I did not report as income the amounts that were deposited into the three accounts. The balances in the accounts were as follows on the dates indicated:

	01/01/92	12/31/92	12/31/93
Charleston County Court account	$393,000	$537,000	$628,000

U.S. District Court account	55,000	30,000	30,000
clients' escrow account	107,909	79,636	92,699
Total	555,909	646,636	750,699

In the notice of deficiency, the Internal Revenue Service, I shall hereinafter refer to the Internal Revenue Service as the Commissioner, determined that that my method of reporting bail bond fees did not clearly reflect income, and a change in method of accounting was necessary. The Commissioner determined that section 481 applied, and that I was required to include in income in 1992 the combined 1992 total; namely, $555,909. In addition, the Commissioner determined that I was required to include in income the net increases in the combined balances of the Charleston County Court and the U.S. District Court accounts in the amount of $119,000 in 1992 and 91,000 in 1993. The Commissioner sought no penalties, only the alleged deficiencies of $219,032 for 1992, and $46,944 in 1993, plus interest.

I was represented in Tax Court by Irvin J. Slotchiver, Esq. and the Commissioner was represented by James E. Gray, Esq. The issue of I.R.C. Section 461(f) was presented and argued in Tax Court and in a Motion for Reconsideration of Opinion.

On October 25, 1999, the Honorable Judge Gale in Tax Court in Columbia, South Carolina found for the Commissioner in this case.

Representing myself, I appealed the Tax Court decision to the Forth Circuit Court of Appeals, and pursued the 461(f) issue in a Petition for Rehearing and Petition for Rehearing En Banc. The Fourth Circuit Court of Appeals affirmed the Tax Court decision in an unpublished opinion.

REASONS FOR GRANTING THE WRIT

Based on the following unique issues, facts and equitable principles, the petitioner prays for the Honorable Court to grant this petition.

I

AN UNIQUE AND UNRESOLVED QUESTION EXISTS REGARDING DEDUCTION UNDER I.R.C. SECTION 461(f)

The purpose of Section 461(f) is to allow a current deduction for monies expended for liabilities to be contested to allow for a true reflection of income. There exists no precedent (found by appellant) on the issue of whether or not section 461(f) may give rise to a tax deduction under South Carolina

statue. Further, 461(f) has yet to be addressed by any Court directly in terms of the circumstances of a professional bail bondsman (in any State). The 461(f) issue is unresolved and unique.

Notably, Chapter 53 of Title 38 of the South Carolina Code of Laws, has never been tested in any income tax case. The promulgation of a decision by this Honorable Court in regards to this case will necessarily either affirm or change the underlying facts that are asserted and argued by Petitioner, in that taxpayer did not have a beneficial interest in the specific funds transferred in Trust to the Clerk of Court. This conclusion is in harmony with the factors discussed in Rameau A. Johnson, et ux. et al v. Commissioner, 108 T.C. No. 22 (pages 275-280); and in regard to VALUE IN MONEY. (Trust Fund cannot be valued in terms of money). In order to be sufficient for purposes of the Regulations, "items" include only those that can be valued in terms of money. Reg. Section 1.446-1(a)(3). Estate of Clarence W. Ennis, 23 T.C. 799 (NA) at p. 802 (where the Tax Court's conclusion involved a contract that might be saleable if discounted at 50% "on cross-examination, he indicated that if the balance of the contract were discounted as much as 50 per cent, it might be possible to find a buyer. He testified that in his experience he had never known of a contract with so large a balance due, to be sold. He also considered that the necessity of renewing the liquor license annually had considerable bearing of the value of the contract

because such licenses could be suspended for infractions of the State liquor laws.") In Re: Steen v. U.S., 509 F. 2d 139835 AFTR 2d 75-623 (where the right to the payment depended entirely upon a favorable judicial decision on a novel question of state law, and the Court said that payment was "wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty."). See: Southern Pacific Transportation Co., 75 T.C. 497 (1980), at 684-85 and 742.

The Tax Court's conclusion that, since no deduction is allowed (citing Stendig on page 32) there can be no deduction under section 461(f), overlooks these two points. First, that actual bail bond losses give rise to expense deductions for tax year involved; and, second, that Stendig does not concern the mandated contest of an asserted liability.

II

THE COURT OF APPEALS AND TAX COURT MADE SEVERAL CLEARLY ERRONEOUS DETERMINATIONS OF FACT

In the Commissioner's Reply Brief of July 19, 2000, counsel for the Tax Division of the Department of Justice made several clearly erroneous statements of fact. Additionally, the Fourth Circuit Court of Appeals relied upon said

erroneous statements and upon several erroneous determination of fact made by the Tax Court in the case at hand. To wit:

(a) Erroneously stated that appellant maintained an account for the purpose of "covering bail forfeitures for defendants in the United States District Court (hereafter, the "federal account")"(page 4).

This is clearly erroneous, there was no separate account for forfeitures, federal or otherwise. Pursuant to the Clerk of Federal Court, I was required to tender a certificate of deposit in the full amount of the surety required; which was returned upon disposition of the case. This money came from the "clients' escrow account", as did all funds for certificates of deposit. As each Federal Court case was ended, the money from the certificate was returned to the "clients' escrow account".

(b) Erroneously referred to "in house account" (page 5) as "..an account into which taxpayer deposited all his bonding fees and from which he then disbursed money for any purpose - including to satisfy liability in the event of forfeiture; to make increases as necessary to the Charleston County Court and federal accounts; to pay other business expenses' and to pay taxpayer's salary."

This is clearly erroneous, this account was used as a "clients' escrow account". All monies received were placed in this account and held. When an increase in surety was required by the Clerk of Court, a certificate of deposit was obtained and placed with the Clerk of Court for Charleston County; further, a percentage of the gross receipts was transferred to a separate business account. This account was used to pay all expenses, fees, and salaries.

(c) Erroneously stated that "..he excluded from his gross income the amount of his fees that he deposited in the three accounts..".(page 5)

This is clearly erroneous, the only amount excluded from gross income were the certificates of deposit held by the Clerk of Court for Charleston County; monies in the "clients' escrow account"; and any certificates of deposit held by the Federal Court.

(d) The Tax court failed to recognize facts distinguishing Rankin and Sebring. The Commissioners's reference to Rankin v. Commissioner, (page 14) "..(bail bondsman's practice of deducting from income amounts placed on deposit with sureties was part of his method of accounting)"and Sebring v.Commissioner, (page 19 - 20), ...taxpayer was a professional bail bondsman who acted

as an agent for sureties that issued the bonds..."

These were not professional bail bondsmen as defined by South Carolina State Statute, Chapter 53, Title 38. As a professional bail bondsman in South Carolina, the Clerk of Court for each county, oversees each professional bail bondsman domiciled in his home county. It is the responsibility of the Clerk, to insure that people of South Carolina and the Court will have sufficient surety on hand to satisfy the State Statute. Further, Sebring v. Commissioner, is notably distinguishable on the facts that Sebring in no way was affected by S.C. Bond law. Sebring hangs on the final conclusion that the funds in each BUF account belonged to the Petitioner. In this case, the same final conclusion cannot obtain, because the facts are different. Taxpayer's facts plainly do not involve a "relationship with the sureties and his indemnity agreement with them". Sebring at page 227 The effect of the rigid S.C. Bond law is the distinguishing factor. It should not be ignored or lightly regarded.

(e) The Commissioner supports taxpayer's contention that the Tax Court erred in it's conclusion, page 26, "...(Ibid.) Indeed, as the Tax Court correctly held, taxpayer's reliance on the possibility of a court revoking a bond contract and requiring return of the fee is misplaced because taxpayer's method of accounting was not one of placing all fees in

> one of the three accounts and excluding it from income until all contingencies regarding that particular fee ceased to exist. (Doc. 18 at 23.) Rather, taxpayer excluded from income all amounts on deposit in the accounts, regardless of whether or not those amounts could be tied to fees that were subject to return. (Ibid.)"

All fees received were placed into one account, the "clients' escrow account". A percentage of the gross receipts was transferred to a separate business account. This account was used to pay all expenses, fees, and salaries. Taxes were paid on this percentage.

III

THE COURT OF APPEALS AND TAX COURT MADE SEVERAL ERRONEOUS CONCLUSIONS OF LAW DE NOVO

The Fourth Circuit Court of Appeals made several erroneous conclusions of law in its review for the case at hand. To wit:

> (a) The Commissioner stated that "...the Tax Court rejected taxpayer's argument that, because the receipt of fees and the subsequent deposit of money into the Charleston County court account were interrelated, the receipt of the amounts deposited was of "no moment" and taxpayer

> was not required to include it in income.(Doc. 18 at 19.) Rather, the court found that there was no requirement that there be a direct relationship between the fee taxpayer received for a bond and the amount deposited in the court account..." (page 10) and further, (page 10), "The court further rejected taxpayer's argument, again directed only to the Charleston County account, that the deposits were held in trust and therefore not income when received. (Id. At 20) Because the Tax Court found that the taxpayer acquired a beneficial interest in the funds at the time of their deposit..."

This is a clearly erroneous conclusion, because it predicates its determination on the taxpayer's "receipt" of "fees" and the "deposit of money". The "deposit" with the Charleston County Clerk of Court was mandated by S.C. Code Sec. 38-53-270 and S.C. Code Sec. 38-53-280. (All S.C. Code references are found in Jt. Ex. 5-E Stip.). The subject "receipt" and the subject "deposit" were one interrelated transaction. The taxpayer's subject "receipt" (because of mandatory statutory deposit) was transitory and illusory; and consequently was of no moment. In these circumstances (due to the mandatory statutory deposit), the taxpayer should not be said, to have ever had any beneficial interest in the subject "receipt". Alternately, the subject "receipt" (because of the mandatory statutory "deposit")

raised a "presumptive" or "resulting trust" (89 C.J.S. Trusts Sec. 14, Footnote 69, Other Definitions (3), citing McGill v. McGill, 113 p. 2d 826, 827).

Further, the taxpayer's lack of beneficial interest in the subject "receipt" should preclude the respondent from lawfully including it in the taxpayer's gross income, because the subject "deposits" maintained with the Clerk of Court pursuant to S.C. Code Sec. 38-53-270 and S.C. Code Sec. 38-53-280, are deposited "in trust" in a statutory Trust; and the statutory Trust is for the "sole benefit" of the Clerk of Court. (Stip. Para. 9, 13 -15). The subject "deposits" are under a statutory Power of Attorney authorizing the Clerk of Court to sell or transfer them if it is considered to be necessary to pay "any" liability arising under a bond given by the professional bail bondsman. (S.C. Code Sec. 38-53-290). The record overall demonstrates that the taxpayer lacks any beneficial interest in the subject "receipts", in the subject "deposits" or in the statutory Trust.

(b) In an erroneous conclusion of law regarding when income was earned, the Commissioner's response, (page 14 - 15), "....the right to receive income generally becomes fixed - thus requiring taxpayer to report the income - when the earliest of the following occurs: (1) the income is actually or constructively received; (2) the income

> is due; or (3) the income is earned by performance." And further (page 15), "....all three of these requirements were met in the instant case at the time taxpayer received a fee from a client." See also Stendig v. Commissioner, (page 16) "...taxpayer had a fixed right to all his fees upon receipt.."

There can be no doubt that income was not earned until the State of South Carolina was satisfied. Further, as an accrual basis taxpayer, this accounting precedent (found by appellant) has never been addressed by the Court.

> (c) The Tax Court and the Fourth Circuit Court of Appeals reached an erroneous conclusion of law regarding who is the client, in referencing Miehle v. Commissioner, pages 20 - 21, "...retained client advances in a special account (the "trustee account")."; and "...the Tax Court concluded that it was clear that the prepaid legal fees received by the firm were to be treated as owned by the client until an undisputed amount was due to the firm."

The reference to client, in this decision does not take into consideration that my client is, both the defendant and the State of South Carolina. The State must be satisfied before the entire premium is earned. The State, in fact, is my first responsibility; the defendant is second.

> (d) The Tax Court and the Fourth Circuit Court of Appeals reached an erroneous conclusion of law regarding rights in accounts, in reference to paragraph 2, page 23, "...the account was instead a "clients' escrow account" where funds were held until earned and dispersed, is belied by the record, which makes clear that, under taxpayer's bonding contracts, the clients had no remaining right to the fees paid to taxpayer once the contract was executed and the bond was issued. (Doc. 7 at 46-49; Ex. 8-E.)"

Again, this is for the defendant, not the Court. The Court can and has ordered "bond fees" returned. Further, these funds were held in trust by the Clerk of Court for Charleston County; "for the sole protection and benefit of the holder of bail bonds.". The Respondent overlooks the fact the Court is in total charge. The taxpayer's transfer is of "money or other property beyond his control, to a Court with jurisdiction over the Contest". Reg. Section 1.461(c)(1) and Reg. Section 1.461(c)(2) Example (3) Further, a justiciable controversy may exist notwithstanding all of the facts and the law are admitted by all the parties. Matter of Reisenberg, 28 S.Ct. 219, 223. 208 U.S. 90.

> (e) The Tax Court and the Fourth Circuit Court of Appeals insistence that this case is not analogous to the line of case under

Commissioner v. Indianapolis Power & Light Co., 493 U.S. 203 (1990), 65 AFTR2d 90 - 394, page 24 paragraph 2, is not well founded, especially when the nature of the rights and obligations imposed by virtue of S. C. Bond law are factored in.

In Indianapolis Power the key in determining whether the utility had complete dominion over deposits was whether there was any certainty that the utility would be allowed to keep the deposits, and turned on the nature of the rights and obligations assumed when the deposits were made. One additional comment: In Indianapolis Power (footnote 7) the Commissioner conceded that the deposits (in issue here) would not be taxable if they were placed in escrow. This concession would certainly seem to (at least) highlight a viable concern that Respondent's position is a tenuous one (in light of the S.C. Bond law).

(f) The Tax Court and the Fourth Circuit Court of Appeals reliance on Stendig, page 24, is misplaced (emphasis added), and reaches an erroneous conclusion of law regarding distinguishing factors of Stendig. Stendig is easily distinguishable on the facts. There, the possibility of "nonbeneficial" expenditures was "remote"; and the Stendig court stated that "all of these permitted expenditures would obviously benefit the partnership or

> increase the value of its property". Indeed, the Stendig court's explanation seems to leave open a clear implication that if (as is the situation in this case) the possibility of nonbeneficial expenditures was clearly more than remote, a different conclusion may have applied. The Stendig court had been offered nothing (other than speculation and surmise) to indicate that Stendig would not ultimately recover the deposited funds.

The Commissioner's assertion that "THE TAX COURT CORRECTLY HELD THAT RECOGNITION OF THE FEES DEPOSITED IN THE RESERVE ACCOUNT IN THE YEAR OF DEPOSIT CONSTITUTED A CHANGE IN TAXPAYER'S METHOD OF ACCOUNTING, SO THAT AN ADJUSTMENT UNDER CODE SECTION 481 WAS APPROPRIATE", PAGE 26 - 30, is flawed.

The Tax Court and the Fourth Circuit Court of Appeals failed to take into consideration the facts that Sebring in no way was affected by the impact of the S.C. Bond law. Sebring hangs on the final conclusion that the funds in each BUF account belonged to the petitioner. In this case, the same final conclusion cannot obtain, because the facts are different. Taxpayer's facts plainly do not involve a "relationship with the sureties and his indemnity agreement with them." Sebring at page 227 The effect of the rigid S.C. Bond law is the distinguishing factor. It should not be ignored or

lightly regarded. Respondent again citing Rankin, ignores the effect of the S.C. Bond law.

IV

THE COURT OF APPEALS AND TAX COURT OVERLOOKED QUESTIONS OF EQUITY

The Fourth Circuit Court of Appeals and the Tax Court overlooked breeches in equity and fairness by the Internal Revenue Service in the case at hand. To wit:

> (a) The Commissioner addresses the unfairness of Section 481, on page 30 - 31, "...Section 481 adjustments is unfair and imposes a "built-in-penalty" because taxpayer lost the opportunity to use devices such as Keogh plans to reduce the tax in the year it actually was due. Section 481, however, exists to prevent income from escaping taxation and giving a windfall to taxpayers as a result of a change in the taxpayer's accounting method. '..taxpayer's contention that application of Section 481 unfairly deprives....' without even any evidence that he would have or could have in fact taken greater advantage of such devices..."

At no time did the Commissioner ever find that taxpayer was trying to escape taxation, to the contrary, no penalties were ever sought. Further, taxpayer has always fully funded an approved retirement plan. Taxpayer maintains that by instituting Section 481 the Commissioner acted with prejudice in this matter. At the time this process started, taxpayer was represented by counsel, and offered to agree to settle this case if taxpayer was allowed to include the contested funds as income over a period of time, to allow taxpayer to take advantage of these programs; and to abate the interest assessed by the Commissioner. This was dismissed, because the Commissioner said "This was a "Special Class Audit" and was not allowed.".

> (b) The Commissioner's answer to the unfairness argument, page (32 - 34), "...To the extent taxpayer's argument is that he was unfairly targeted in the auditing process,.." fails to consider that by treating taxpayer differently than another taxpayer in a similar circumstance only because he was part of a 'Special Class Audit', would only lead to a presumption of unfairness.

Taxpayer was told that his case would have been treated differently had it been found during a regular audit. Taxpayer's counsel was denied the opportunity for "an agreed to case", because this was a "Special Class Audit", and no concessions could be allowed. It is my understanding that

because of changes in Internal Revenue Service procedures, this is no longer the case.

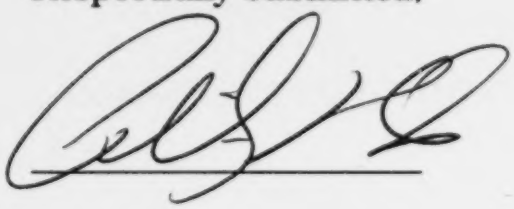
In light of recent Congressional mandates, making the Internal Revenue Service more taxpayer friendly, I believe that the Commissioner should re-examine this case. The fact that the softening of unwritten rules and procedures for abatement of interest by the Commissioner only highlights the petitioner's position that perhaps he was treated in an unequal fashion. After all, is not the purpose of the Judiciary to protect the citizen from unfair treatment? Can the Court really agree that what is unfair in the year 2001, could be fair in the year 1992? Petitioner has no case law to support this contention, with apology to the Honorable Court. However, I must state the facts.

(c) Petitioner sought a fair and honorable outcome to an "agreed to case" wherein all taxes would be paid on all income in question without the undue hardship of interest and other collection costs. Instead, petitioner has spent valuable time and funds to avoid injuries resulting from what at worst could be called a "mistake" by an accountant, who was a "student" of applied tax law since their inception, and at best, an affirmation by this Honorable Court that he was indeed correct in his accounting procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 6/14/2001

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1639

PHILIP L. FIRETAG,

Petitioner –

Appellant,

Versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent –

Appellee.

Appeal from the United States Tax Court. (Tax Ct. No. 97-4021)

Submitted: September 29, 2000 Decided: October 12, 2000

Before NIEMEYER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Philip L. Firetag, Appellant Pro Se. Steven Wesley Parks, Ellen Page DelSole, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Philip L. Firetag appeals the tax court's order determining defiencies with respect to his 1992 and 1993 federal income tax liability. Our review of the record and the tax court's opinion discloses no reversible error. Accordingly, we affirm on the reasoning of the tax court. See Firetag V.Commissioner, No. 97-4021 (U.S. Tax Ct. Mar. 1, 2000). We dispense with oral rgument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
JANUARY 17,2001

No. 00-1639
97-4021

PHILIP L. FIRETAG
Petitioner - Appellant

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent – Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for Rehearing and rehearing en banc is denied.

For the Court,

/s/Patricia S. Conner
CLERK

APPENDIX B

T.C. Memo. 1999-355

UNITED STATES TAX COURT

T.C. Memo. 1999-355

UNITED STATES TAX COURT

PHILIP L. FIRETAG, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4021-97. Filed October 25, 1999.

Irvin J. Slotchiver, for petitioner.

James E. Gray, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

GALE, Judge: Respondent determined the following deficiencies in petitioner's Federal income tax:

Year	Deficiency
1992	$219,032
1993	46,944

After concessions, we must decide the following:

(1) Whether petitioner is required to recognize as income in the years in issue amounts deposited

into certain accounts as described below. We hold that he is. (2) Whether recognition of the deposited amounts in the year of deposit constitutes a change in accounting method, requiring an adjustment to petitioner's under section 481.[1] We hold a section 481 adjustment is required.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. We incorporate by this reference the stipulation of facts, the supplemental stipulation of facts, and the attached exhibits. At the time of filing the petition, Petitioner resided in Charleston, South Carolina.

Petitioner was a licensed professional bail bondsman, and before trial he had been in the bonding business for more than 20 years. Petitioner conducted his bonding business as a sole proprietorship. The proprietorship income was reported using the accrual method of accounting. Petitioner wrote bonds for criminal defendants to ensure their future appearance in

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[1] Unless otherwise noted, all section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

court. The bonds varied in amount and were set

the court. The defendants, or someone on their behalf (collectively, petitioner's clients), would pay petitioner a fee (usually equal to 10 percent of the amount of the bond, sometimes less), and in exchange petitioner would assume liability under the bond, guaranteeing the defendant's appearance at court proceedings. Under the standard bonding agreement used by petitioner, the fee was due from a client when the agreement was signed. In addition, the bonding agreement provided that the fee was earned upon execution of the agreement. Petitioner's practice generally was to obtain a co-guarantor on the bond, such as a family member or friend of the defendant. If petitioner was unable to perform on his guaranty, i.e., if the defendant failed to make the court appearance, petitioner was liable to the court for the full amount of the bond.[2]

As a professional bail bondsman, petitioner was required to comply with chapter 53 of title 38 of the Code of Laws of South Carolina. Pursuant to these provisions, petitioner was required to maintain, with the clerk of court of the relevant South Carolina jurisdiction, passbook savings accounts or certificates of deposit in an amount equal to 25 percent of all outstanding bonds on which he was liable in that

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[2] Petitioner's practice generally was to obtain a co-guarantor on the bond, such as a family member or friend of the defendant.

jurisdiction.[3] The amount required to be maintained was recomputed as of the bonds outstanding on that date, and petitioner had until the 16th of the month to make any additions required to ensure that the amounts maintained with the clerk were equal to at least 25 percent of the face amount of bonds outstanding on the first of the month. See S.C. Code Ann. sec. 38-53-270 (Law. Co-op. 1989). The savings accounts or certificates of deposit were held in trust in the name of the clerk of court for the "sole protection and benefit of the holder of bail bonds" and functioned as security for petitioner's potential liability on outstanding bonds. S.C. Code Ann. sec.38-53-280 (Law. Co-op. 1989). In the event of a forfeiture, i.e., the failure of a defendant to appear for trial, making petitioner liable for the bond amount, petitioner had the option of meeting his liability using funds maintained with the clerk of court or from some other source. Under South Carolina law, petitioner was entitled to a return of the excess whenever the amounts maintained with the clerk exceeded 25 percent of petitioner's bonds outstanding and was entitled to the return of all such amounts when his bond obligations in the jurisdiction were completely satisfied. See id.

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3 In addition, no single bond written by petitioner could be in an amount greater than 50 percent of the amount maintained with the clerk of court. See S.C. Code Ann. sec. 38-53-330 (Law. Co-op. 1989).

Pursuant to the foregoing provisions of South Carolina law, petitioner maintained various savings accounts and certificates of deposit with the Clerk of Court for Charleston County, South Carolina, prior to and during the years in issue, in connection with his activities as a professional bail bondsman. We shall hereinafter refer to these savings accounts and certificates of deposit held by the Charleston County Clerk of Court as the Charleston County Court account. At no point during the years in issue, or in any year prior thereto, were funds from the Charleston County Court account used to satisfy a forfeiture.

Petitioner received any interest earned on the funds in the Charleston County Court account.

Petitioner also kept two other accounts, one with respect to the U.S. District Court and another which the parties refer to as the "in-house account". The record does not establish what provisions of law or contract terms governed the U.S. District Court account.[4] In particular, the record does not disclose under what schedule petitioner was required to deposit, or was entitled

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4 In his opening statement at trial, petitioner's counsel indicated that no statute governed the U.S. District Court account, and that an amount equal to the entire face value of the bond was required to be deposited therein. However, no evidence was adduced regarding the foregoing.

to return of, amounts in the U.S. District Court account.

As for the in-house account, it was not required by any law or contract. It was established at the suggestion of Petitioner's father, a bookkeeper, who kept petitioner's books and prepared his tax returns. All fees collected petitioner for bonding services were deposited into the in-house account. The moneys from the in-house account were then disbursed for four purposes: To satisfy petitioner's liability in the event of forfeitures, to satisfy required increases in the amounts in the Charleston County Court and U.S. District Court accounts, to pay petitioner's business expenses, and to pay petitioner a "salary".[5] Petitioner reported gross receipts from his bonding business of $80,456 in 1992 and $100,467 in 1993. However, for taxable years prior to and including 1992 and 1993, petitioner did not report as income the amounts that were deposited into the three accounts. The balances in the accounts were as follows on the dates indicated:

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[5] Petitioner's testimony regarding his salary is limited and vague. On the basis of his testimony, the amount of the salary appears to have been either a percentage of the fees he collected or a percentage of the amount in the in-house account.

	1/1/92	12/31/92	12/31/93
Charleston County Court Account	$393,000	$537,000	628,000
U.S.District Court account	55,000	30,000	30,000
In-house Account	107,909	79,636	92,699
Total	$555,909	646,636	750,699

In the notice of deficiency, respondent determined that petitioner's method of reporting bail bond fees did not clearly reflect income, and that a change in method of accounting was necessary. Respondent determined that section 481 applied, and that petitioner was required to include in income in 1992 the combined balance of the three accounts as of January 1, 1992; namely, $555,909. In addition, respondent determined that petitioner was required to include in income the net increases in the combined balances of the Charleston County Court and U.S. District Court accounts in the amount of $119,000 in 1992 and $91,000 in 1993.

OPINION

Section 446(b) provides as follows: "If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in

the opinion of the Secretary, does clearly reflect income." For an accrual method taxpayer, " it is the right to receive accrual basis income, not its actual receipt, that determines the time of its inclusion as gross income." Stendig v. United States, 843 F.2d 163, 165 (4th Cir. 1988) (citing Commissioner v. Hansen, 360 U.S.446, 464 (1959)); see Johnson v. Commissioner, 108 T.C. 448, 459(1997), affd. in part, revd. in part and remanded on another ground 184 F.3d 786 (8th Cir. 1999); secs. 1.446-1(c)(1)(ii),1.451-1(a), Income Tax Regs. Generally, all the events that fix the right to receive income have occurred when the earliest of the following occurs: The income is (1) actually or constructively received, (2) due, or (3) earned by performance. See Johnson v. Commissioner, supra at 459. In the instant case, all three of these occurred when petitioner received a fee from a client: It was actually received; it was due under the terms of the bonding agreement; and it was earned by the execution of the bond agreement. Thus, the fees were income when received. Charleston County Court and U.S. District Court Accounts In Stendig v. United States, supra, the Court of Appeals held that rental receipts received by an accrual basis partnership from its housing project but required by the lender to be deposited into reserve accounts securing repayment to the lender were nevertheless income to the partnership in the year deposited. The partners had argued that the amounts were not income until a later year, when they obtained unrestricted access to them. The key question for the Court of Appeals was

"whether * * * the partnership acquired the 'fixed right to receive the [funds deposited in the] reserves.'" Id. at 165 (quoting Commissioner v. Hansen, supra). The Court of Appeals held that the partnership had acquired the fixed right, and hence must accrue the amounts as income, "in the years of their deposit" rather than at "the time of actual receipt." Id. at 166. The reason was that any use of the funds would inure to the benefit of the partnership. See id. at 166-167.

Petitioner argues that in his case the deposits were required by law rather than by contract. This is irrelevant. In either case, the deposits were necessary to do business. Petitioner, as an accrual method taxpayer with respect to his business, was required to include in gross income of the business amounts deposited into the Charleston County Court account when he acquired the fixed right to receive those amounts. As in Stendig v. United States, supra, this occurred when the amounts were received from his clients, even though some of the proceeds may have been required to be deposited with a third party. The situation is virtually identical with the facts in Stendig. Like the partnership in Stendig, petitioner collected receipts and was required to deposit a portion of them as a necessary condition of doing business.[6] Like the partnership in Stendig, petitioner did not have access to the funds while they were on deposit (except for interest earned), but the funds would ultimately be his; i.e., the deposits would inure to petitioner's benefit. The amounts on

deposit either would be returned to him because the level of outstanding bonds had been reduced or would be used by the clerk toward satisfaction of Petitioner's obligation under a bond. See Commissioner v. Hansen, supra at 466. Therefore, we find that petitioner was required to include in gross income the amounts deposited into the Charleston County Court account in the year received from clients.

With respect to the U.S. District Court account, petitioner has not adduced evidence regarding the terms under which amounts were required to be deposited for bonds written for defendants in U.S. District Court. In his opening statement, petitioner's counsel indicated that deposits equal to 100 percent of the face amount of the bond were required. Presumably, these amounts were either returned to petitioner when the defendant satisfactorily appeared or forfeited if he did not. In either case, the deposited amounts would inure to petitioner's benefit. Because petitioner has not come forward with the terms of the U.S.District Court bonding arrangements, he has failed to carry his burden of proving respondent's determination erroneous.

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6 Petitioner argues that in his case the deposits were required by law rather than by contract. This is irrelevant. In either case, the deposits were necessary to do business.

In-House Account

The in-house account appears, in part, to be an effort by petitioner to set up a reserve for paying potential bond forfeitures. In other words, it acts, in part, as a reserve against contingent liability. The funds in the in-house account were ultimately disbursed solely for petitioner's benefit: To satisfy his obligations by paying bond forfeitures or increasing the amounts on deposit in the Charleston County Court or the U.S. District Court accounts; to pay his business expenses; or to pay himself a "salary". As with the Charleston County Court account and presumably with the U.S. District Court account, only two things could happen to the funds in the in-house account: They could be paid to petitioner in cash or they could be used to pay an obligation of petitioner. See Commissioner v. Hansen, 360 U.S. at 465-466. In either case, they would inure to his benefit. Thus, following Commissioner v. Hansen, supra, and Stendig v. United States, 843 F.2d 163 (4th Cir. 1988), the amounts deposited in the in-house account are income in the year received from clients, notwithstanding their deposit.

For the foregoing reasons, we sustain respondent's determination that petitioner must include in gross income the net increase in the combined balances of the Charleston County Court and the U.S. District Court accounts in the amount of $119,000 in 1992 and $91,000 in

1993.[7]

Section 481 Adjustment

In the notice of deficiency respondent determined that section 481 applied, and that under section 481, petitioner was required to include in income the amounts on deposit in the three accounts a of the beginning of 1992. We agree.

Section 481

SEC. 481(a). General Rule.--In computing the taxpayer's taxable income for any taxable year (referred to in this section as the "year of the change")—

(1) If such computation is under a method of accounting different from the method under which the taxpayer's taxable income for the preceding taxable year was compute, then

(2) there shall be taken into account those adjustments which are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted, except there shall not be taken into account any adjustment in respect of any taxable year to which this section does not apply unless the adjustment is attributable to a change

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[7] See infra note 13.

in the method of accounting initiated by the taxpayer.

By its terms, section 481 applies only when there is a change in method of accounting. Section 1.446-1(e)(2)(ii)(a), Income Tax Regs., describes a change in method of accounting as follows: "A change in the method of accounting includes * * * a change in the treatment of any material item * * * A material item is any item which involves the proper time for the inclusion of the item in income or the taking of a deduction." In other words, a change in method of accounting does not involve whether or not an item of income is included, but when. See Knight-Ridder Newspapers, Inc. v. United States, 743 F.2d 781, 798 (11th Cir.1984). However, the regulations provide several specific limitations:

> A change in method of accounting does not include correction of mathematical or posting errors, or errors in the computation of tax liability * * * . Also, a change in method of accounting does not include adjustment of any item of income or deduction which does not involve the proper time for the inclusion of the item of income or the taking of a deduction. * * * A change in the method of accounting also does not include a change in treatment resulting from a change in underlying facts. * * * [Sec. 1.446-1(e)(2)(ii)(b), Income Tax Regs.]

Respondent relies principally on Rankin v. Commissioner,T.C. Memo. 1996-350, affd. 138 F.3d 1286 (9th Cir. 1998), to support his determination applying section 481. In Rankin, the taxpayer, who used the cash receipts and disbursements method of accounting, was a bail bondsman associated with an insurance company surety. The bonds were contracts between the criminal defendant, the State, and the insurance company. The insurance company was principally liable to the State if the defendant failed to appear at trial and the bond was forfeited or a late fee was charged. However, the taxpayer had a contract with the insurance company under which the taxpayer would indemnify the insurance company for the amount of any forfeited bonds or late fees. The taxpayer collected 10 percent of the face amount of the bond as a fee, paid a portion of the fee to the insurance company, deposited a portion of the fee into a specific account known as the Build Up Fund or BUF account, and kept the remainder. The BUF account served as security for the taxpayer's promise to indemnify the insurance company. The amount accumulated in the BUF account was a percentage of the amount of the outstanding bonds. The insurance company functioned as trustee of the BUF account and had the sole power to withdraw funds from the BUF account but could use any withdrawn funds only to satisfy the taxpayer's indemnity obligations. The insurance company gave the taxpayer the option of indemnifying from the BUF account or from independent funds. When the taxpayer terminated

his agreement and all outstanding bonds were satisfied, the taxpayer would be entitled to the funds in the BUF account. The taxpayer deducted deposits into the BUF account as a portion of cost of goods sold. See Rankin v. Commissioner, supra.

The parties in Rankin agreed that the taxpayer was not permitted to deduct deposits into the BUF account.[8] The parties disagreed over the treatment of the amounts accumulated in the BUF account prior to the years in issue. In an attempt to avoid the application of section 481, the taxpayer argued that the change in treatment of the deposits into the BUF account that the Commissioner was requiring was not a change in method of accounting. We held that it was, because the change affected only the timing of inclusion, not the ultimate fact of inclusion. See id.; see also Schuster's Express, Inc. v. Commissioner, 66 T.C. 588, 596-597 (1976), affd. without published opinion 562 F.2d 39 (2d Cir. 1977); sec. 1.446-1(e)(2)(ii)(b), Income Tax Regs. ("a change in method of accounting does not

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8 The parties relied on Sebring v. Commissioner, 93 T.C. 220 (1989), an earlier case with virtually identical facts. The issue in Sebring was whether a cash basis bail bondsman could properly deduct deposits into a BUF account at the time of deposit. We held that he could not deduct amounts when they were deposited, even though the deposits were mandatory. See id. at 227.

include adjustment of any item of income or deduction which does not involve the proper time for the inclusion of the item of income or the taking of a deduction").

We consider first the Charleston County Court and U.S. District Court accounts. Here, the instant case is indistinguishable from Rankin. As in Rankin, respondent's change of petitioner's treatment of the amounts deposited into the accounts was a change in method of accounting, because it affected only the timing of inclusion, not the ultimate fact of inclusion. Under petitioner's method, he would have been required to include in income the funds in the accounts in the year they ultimately became available to him.[9] Any amounts actually paid to satisfy forfeited bonds would not be included.[10] Under respondent's method, petitioner would be required to include in income the funds in the accounts in the year of deposit, but he would be

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[9] The evidence establishes that petitioner was entitled to receive all of the amounts in the Charleston County Court account when his bond obligations were completely satisfied. The same appears to be true of the U.S. District Court account; at the least, there is no evidence, or suggestion, to the contrary.

[10] As we have found, no funds from the Charleston County Court account were used to satisfy a forfeiture before or during the years in issue.

entitled to deductions for amounts actually paid to satisfy forfeited bonds, so the total amount required to be included in income would be the same. Thus, respondent's method alters only the timing of inclusion, not the facts of inclusion. involve the proper time for the inclusion of the item of income or the taking of a deduction"). It is therefore a change in method of accounting, and section 481 applies.

We next consider the in-house account. Under petitioner's method, he would have been required to include in income in the year of disbursement any funds disbursed from the in-house account for his benefit.[11] He would be entitled to take deductions for all allowable business expenses. Further, petitioner would ultimately receive any funds remaining in the in-house account.[12] Under respondent's method, petitioner would be required to include in income the funds in the account in the year of deposit,

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[11] That is, any funds used to satisfy a liability in the event of forfeiture, to satisfy required increases in the amounts in the Charleston County Court and U.S. District Court accounts, to pay business expenses, or to pay petitioner's "salary".

[12] The precise nature of the in-house account is not clear. In testimony, petitioner refers to it as an "escrow account". However, there is no evidence, or suggestion, that petitioner would not receive any funds remaining in the account.

but he would be entitled to take deductions for amounts used to pay all allowable business expenses, so the total amount required to be included in income would be the same. Once again, respondent's method alters only the timing of inclusion, not the fact of inclusion. It is therefore a change in method of accounting, and section 481 applies.

Section 481(a)(2) authorizes "those adjustments which are determined to be necessary solely by reason of the change [in method of accounting] in order to prevent amounts from being -* * * omitted". Further, it is well established that section 481 supersedes the statute of limitations. See Graff Chevrolet Co.v. Campbell, 343 F.2d 568 (5th Cir. 1965); Superior Coach, Inc.v. Commissioner, 80 T.C. 895, 912 (1983). If petitioner merely changed, starting in 1992, to an accounting method under which amounts are included in income when received from clients, this method would not result in the inclusion in income of amounts previously excluded because deposited into the court and in-house accounts. Without section 481, such amounts would generally escape taxation. Section 481 allows respondent to prevent such omissions by requiring petitioner to include in income in 1992 the amounts previously accumulated in the three accounts.

Petitioner argues that section 481 does not apply because there has been no change in method of accounting. It is true that a change in method of accounting is necessary to trigger

section 481, but petitioner's attempts to show that there was no change in method are unavailing. Petitioner first argues that there was no change in method of accounting, relying on section 1.446-1(e)(2)(ii)(b), Income Tax Regs., which provides that "A change in the method of accounting * * * does not include a change in treatment resulting from a change in underlying facts." However, although petitioner argues in general that there was a change in underlying facts, he points to no such change, and we have found none.

Petitioner next relies on another provision of the same regulation, which states: "A change in method of accounting does not include correction of mathematical or posting errors, or errors in the computation of tax liability". Sec. 1.446-1(e)(2)(ii)(b), Income Tax Regs. Petitioner argues that the accounting treatment of the deposits error, relying on Korn Indus., Inc. v. United States, 209 Ct. Cl. 559, 532 F.2d 1352 (1976). In Korn Indus., the taxpayer manufactured furniture. The taxpayer used separate inventories for raw materials, work-in-process, supplies, and finished goods. There were 14 kinds of material in the finished furniture; e.g., lumber, mirrors, glue, nails. During the years in issue, 3 of the 14 materials costs had not been included in the finished goods inventory, although they were included in the other three inventories. When the taxpayer later took account of the three materials costs, the Government claimed there was a change in accounting method, but the court

found that the taxpayer had merely corrected an error. In the instant case, petitioner's "mistakes" are much more egregious and of a different nature. In 1992, petitioner reported gross receipts from his business as a bail bondsman of $80,456, and increased the balances in his three accounts by a combined total of $90,727. In 1993, petitioner reported gross receipts from his business as a bail bondsman of $100,467 and increased the balances in his three accounts by a combined total of $104,063. In other words, in each year the bonding fees that petitioner deferred reporting exceeded the amount reported. The instant case involves the systematic, consistent treatment of a significant item, not a posting or computational error. See sec.1.446-1(e)(2)(ii)(b), Income Tax Regs. Petitioner's treatment of the deposits was not "error" within the meaning of this regulation.

Petitioner's Additional Arguments

Petitioner presents numerous additional arguments, none of which are persuasive. Petitioner directs his first argument to the Charleston County Court account only and argues that, because the receipt of fees and the subsequent deposit of moneys into the account were interrelated, the receipt of amounts deposited was of "no moment", and petitioner was not required to include it in income. Petitioner is wrong on the facts. Petitioner was required to maintain deposits with the Clerk of Court of Charleston County in the amount of 25 percent of

outstanding bonds. He collected as a fee 10 percent (sometimes less) of each bond he wrote. There was no relationship between the deposits and the fees. There was no requirement that petitioner pay a percentage of the fees he collected into the Charleston County Court account, unlike the taxpayers in Sebring v. Commissioner, 93 T.C. 220 (1989), and Rankin v. Commissioner, T.C. Memo. 1996-350, who paid a percentage of each fee into the BUF accounts. In the instant case, the amounts on deposit could come from anywhere. Thus, the receipts and deposits were not interrelated.

Petitioner's second argument is again directed only to the Charleston County Court account. Petitioner argues that the deposits with the Charleston County Court were held in trust and therefore were not income to him when received. Petitioner cites Angelus Funeral Home v. Commissioner, 47 T.C. 391 (1967), affd. 407 F.2d 210 (9th Cir. 1969), and Miele v. Commissioner, 72 T.C. 284 (1979).

In Angelus Funeral Home, the taxpayer, which computed its income on the accrual basis, operated a funeral home and collected "pre-need" deposits from clients; i.e., payments for future funeral services. The deposits were held in trust for the sole purpose of providing the funeral services, and the taxpayer was obligated to use the entire amount on deposit for that purpose. See Angelus Funeral Home v. Commissioner, supra at 392-393. The Court held that the

amounts on deposit were held in trust for the client's benefit and were not income to the taxpayer until the funeral services were performed. See id. at 397.

In Miele, the taxpayer, which computed its income on the cash receipts and disbursements basis, was a law partnership that collected prepaid legal fees. The fees were maintained in a separate account until actually earned (i.e., when the legal services were performed) and could not be used by the partnership while they were in the separate account. See Miele v.Commissioner, supra at 285-286. The Court held that the prepaid fees were not includable in income (being neither actually nor constructively received) until actually earned. See id. at 290-291.

Petitioner's argument for the existence of a trust is that he is collecting and holding moneys in trust for the benefit of the Clerk of Court for Charleston County. Petitioner points to the fact that the accounts or certificates of deposit were held in trust in the name of the Clerk of Court for Charleston County for the "sole protection and benefit of the holder of bail bonds." However, the key question is whether petitioner acquired a beneficial interest in the funds at the time of their deposit. See Johnson v. Commissioner, 108 T.C. at 475. He clearly did: The deposits would ultimately inure to his benefit. First, petitioner chose whether funds from the Charleston County Court account, or some other funds, were used to pay any bond forfeiture owed to the County.

Second, even if payments were made from the account, they would be to petitioner's benefit, because they would satisfy an obligation of petitioner. Finally, petitioner ultimately would receive the amounts remaining on deposit in the account. On the other hand, in Angelus Funeral Home and Miele, the beneficial interest in the funds on deposit was retained by the taxpayer's clients. Thus, these cases are distinguishable.

Petitioner directs his argument to both the Charleston County Court account and the U.S. District Court account. He argues that section 461 (f) applies, authorizing deductions for the amounts on deposit. Section 461 (f) provides as follows:

> Sec. 461 (f). Contested liabilities.- If--
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> (1) the taxpayer transfers money or other property to provide for the satisfaction of the asserted liability,
>
> (2) the contest with respect to the asserted liability exists after the time of the transfer, and
>
> (3) for the fact that the asserted liability is contested, a deduction would be allowed for the taxable year of the transfer

> (or for an earlier taxable year) determined after application of subsection (h),
>
> then the deduction shall be allowed for the taxable year of the transfer. This subsection shall not apply in respect of the deduction for income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States.

The fundamental problem with petitioner's argument is that section 461 (f) does not by itself create a deduction; it only affects timing. That is, it applies only to a deduction otherwise allowed. See sec. 461 (f) (4). But here, because of Stendig v. United States, 843 F.2d 163 (4th Cir. 1988), no deduction is allowed. Thus, section 461 (f) does not apply.

Finally, petitioner argues that the fees he received from clients were excludable because there was a chance that the court would order the fee refunded to the client. There is some evidence in the record relating to petitioner's argument; namely, petitioners testimony and the testimony of an employee at the Clerk of Court for Charleston County indicating that the judge in a case has discretion to order fees returned. On the other hand, there is no evidence in the record establishing the circumstances (including, for instance, the frequency) of returned fees. But there is a more basic defect with petitioner's

argument; namely, exclusion of fees until resolution of any contingencies regarding their return was not the method of accounting that the petitioner employed. Rather, the method he actually used was entirely different: under his method, he excludes all amounts deposited in the accounts, regardless of whether any fees so deposited were subject to return or not. Thus, this argument must fail.

We have considered petitioner's remaining arguments and find them to be without merit. We accordingly sustain respondent's determination that petitioner was required to include in income in 1992 the combined balances in the Charleston County, U. S. District Court, and in-house accounts as of January 1, 1992;

namely $555,909.[13]

To reflect the foregoing,

Decision will be entered under Rule 155.

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[13] Because we sustain respondent's determination that the balance in the in-house account as of Jan. 1, 1992, must be included in 1992 gross income, we believe the possibility exists that certain amounts in the in-house account could be subject to double taxation,

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although the record is not entirely clear on this point.

It would appear to the Court that the possibility of double taxation exists because the balance in the in-house account decreased between Jan. 1 and Dec. 31, 1992. The record establishes that one possible disbursement from the in-house account was to fund required increases in the Charleston County Court or U.S. District Court account. The Charleston County Court account in fact increased between Jan. 1 and Dec. 31, 1992, and we have sustained respondent's determination that that increase must be included in petitioner's 1992 gross income. However, if any portion of the 1992 increase in the Charleston County Court account was funded with a disbursement from the in-house account, then the possibility appears to exist that this disbursement was taxed both as a part of the existing Jan. 1, 1992, balance in the in-house account and as an increase in the Charleston County Court account between Jan. 1 and Dec. 31, 1992.

We expect the parties to address this problem as part of their Rule 155 computations.